

ORIGINAL

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

In re )  
 )  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations )  
(Clewiston et al., Florida) )

MM Docket No. 93-136  
RM-8161, RM-8309, RM-8310

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To: The Acting Chief, Allocations Branch,  
Mass Media Bureau

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**PETITION FOR RECONSIDERATION**

Key Chain, Inc. ("Key Chain"), the licensee of radio station WAVK(FM), Channel 292A, Marathon, Florida, hereby seeks reconsideration of the Report and Order in this proceeding.<sup>1</sup> The Report and Order substantially granted the Petition for Rule Making of Spanish Broadcasting System of Florida, Inc. ("SBS"), to reshuffle the frequencies of three Florida Keys radio stations -- SBS's own station WZMQ (Channel 280C2 at Key Largo), and two others.<sup>2</sup> However, the Report and Order did grant Key Chain's limited Counterproposal to upgrade WAVK during the reshuffling. But even though SBS had pledged to reimburse Key Chain for the costs of shifting WAVK to another Class A channel, the staff ruled that SBS need not do so -- on the grounds that, in changing channels, as a result of Key Chain's limited Counterproposal, WAVK would obtain an upgrade.

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<sup>1</sup> 59 Fed. Reg. 43064 (August 22, 1994).

<sup>2</sup> The other two are Key Chain's WAVK and Mr. Richard L. Silva's unbuilt WKKB(FM), Channel 288C2, Key Colony Beach.

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As we will show, the Allocations Branch must reconsider the Report and Order, at least to the extent of reversing its ruling that SBS has no duty to cover Key Chain's costs in changing WAVK's operating frequency to accommodate SBS. Firmly established Agency precedent leaves no room for doubt: regardless of any upgrade that Key Chain may undertake while changing WAVK's channel, Key Chain is entitled to reimbursement from SBS -- the party who initiated this proceeding, and the party who is the prime beneficiary of its outcome -- for the Circleville<sup>3</sup> costs of changing WAVK's operating frequency to accommodate SBS.

### **I. BACKGROUND**

1. SBS's proposal appeared schematically as follows:

<b><u>Station</u></b>	<b><u>Present</u></b>	<b><u>Proposed</u></b>
WZMQ	280C2	292C2
WAVK	292A	288A
WKKB	288C2	280C2

Putting SBS's proposal into words, SBS wanted to take WAVK's channel and upgrade it to WZMQ's current Class C2 for SBS's own use at Key Largo. SBS would downgrade Mr. Silva's current Key Colony Beach channel to Class A and give it to Key Chain for use at Marathon. And SBS would give to Mr. Silva WZMQ's present channel at its current Class for his use at Key Colony Beach.

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<sup>3</sup> Circleville, Ohio, 8 FCC 2d 159 (1967).

2. SBS's stated goal was to eliminate "Receiver-Induced Third Order Intermodulation ('RITOI') interference in some automobile receivers within the vicinity of the... antenna" WZMQ shares with WKLG, Channel 271C2, Rock Harbor.<sup>4</sup> Consistent with FCC precedent, SBS properly pledged to reimburse both Key Chain and Mr. Silva for the Circleville costs they would incur changing channels to accommodate WZMQ.

3. The Notice of Proposed Rule Making, 8 FCC Rcd 3886 (1993), proposed to adopt SBS's request. SBS filed timely Comments reiterating its reshuffling proposal. A group of licensees filed a timely Joint Counterproposal involving several potential station upgrades and channel substitutions. Key Chain advanced a limited Counterproposal of its own -- that, in the course of shifting

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<sup>4</sup> Receiver-induced intermodulation interference ("receiver intermod") impedes reception in the vicinity of two or more transmitters, even when the transmitters themselves radiate no spurious products of their own. Rather, affected receivers generate internal products through a heterodyne process when subjected to the strong input signals. The products appear at frequencies related to the sum of and difference between the input frequencies. In a common form, the signals of stations A and B, on frequencies  $f_A$  and  $f_B$ , respectively, interact to create products on frequencies  $((2)(f_A) - (f_B))$  and  $((2)(f_B) - (f_A))$ . This is called "2A-B" or "third order" receiver intermod. SBS claimed that it had "had some reports" of such interference to Channel 262C1 Plantation Key station WCTH(FM). SB's engineers, Carl T. Jones Corporation ("CTJ"), stated that "(RITOI) interference... ha[d] been observed in some automobile receivers within the near vicinity of the shared... site...." SBS and CTJ claimed the channel swap would mitigate the alleged receiver intermod by breaking up the collocation of Channels 271C2 and 280C2.

WAVK to Channel 288, the FCC should upgrade it to Class C2 status.

4. As indicated above, the Report and Order granted SBS's Petition for Rule Making as modified by Key Chain's Counterproposal. The Report and Order rearranged the FM Table of Allotments as follows:

<u>Station</u>	<u>Prior</u>	<u>Modified</u>
WZMQ	280C2	292C2
WAVK	292A	288C2
WKKB	288C2	280C2

The FCC staff rejected the Joint Counterproposers' various upgrades and channel substitutions because they had not included a pledge to reimburse one of the stations they would displace. With regard to WAVK, the Report and Order granted Key Chain's request to upgrade to Class C2 status on WAVK's substitute channel. But the Report and Order stated that SBS did not have to reimburse Key Chain for any costs in changing WAVK's channel because WAVK would obtain an upgrade in the process:

[SBS] has stated its willingness to reimburse the licensee of station WAVK(FM), Marathon, Florida, and the permittee of Station WKKB(FM), Key Colony Beach, Florida, for the reasonable cost[s] associated with the change[s] in channels. However, since the licensee of Station WAVK(FM) at Marathon sought and will receive an upgrade, no reimbursement for expenses will be required for the channel change at Marathon.

In so ruling, the staff apparently failed to consider binding FCC precedent which requires a successful Petitioner for Rule Making to at least partially reimburse all displaced permittees and licensees who upgrade on their substitute channels.

## **II. ARGUMENT**

### **Key Chain Is Entitled to Reimbursement**

5. Commission-level case law makes it clear that Key Chain is entitled to reimbursement from SBS for the equivalent costs of shifting WAVK's operations from Channel 292 to Channel 288. The early cases espousing this principle arose under the Commission's former policy disfavoring the intermixture of Class A and higher-Class channels at the same community -- unless the Class A station was willing to remain Class A and still compete in the market against a higher-Class facility. For example, in Mitchell, South Dakota, 38 Rad. Reg. (P & F) 2d 1688 (1978), the FCC allotted a Class C channel to satisfy a Mitchell AM station's request for an FM frequency. To avoid intermixture, the FCC also upgraded the existing Channel 272A Mitchell FM station to Class C on a channel that could support upgraded operations (Channel 290). The FCC imposed on the AM licensee an obligation to cover the equivalent costs that the Class A FM licensee would have incurred in shifting its facility's operating frequency to the new channel.

Rather than direct the benefitting party [the AM licensee] to bear the costs of two new Class C facilities, we are inclined to favor a limited form of reimbursement that would include the cost of the changes involved in converting only the operating frequency [and not the Class change].... We believe [the FM licensee] would be unjustly enriched if it were to recoup from the benefitting party [the AM licensee] all the expenditures involved in a Class C facility. Likewise, the benefitting party would be unfairly favored if it were to receive a Class C channel without some form of reimbursement.

38 Rad. Reg. (P & F) 2d at 1692-1693.

6. A whole series of cases imposed on the party initiating the rule-making proceeding the same obligation to reimburse, to at least a limited extent, the Class A licensee that would upgrade on its substitute channel. Iron Mountain, Michigan, 46 Rad. Reg. (P & F) 2d 861 (B. Bur. 1979); Ashland, Oregon, 45 Fed. Reg. 23483 (B. Bur. 1980); McCook, Nebraska, 46 Fed. Reg. 4004 (B. Bur. 1981); Ogallala, Nebraska, 49 Rad. Reg. (P & F) 2d 1675 (B. Bur. 1981), recons. on other grounds, 50 Rad. Reg. (P & F) 2d 171 (B. Bur. 1981); Carnelian Bay, California et al., 50 Rad. Reg. (P & F) 2d 1179, 1182 (B. Bur. 1982); Devil's Lake, North Dakota, 51 Rad. Reg. (P & F) 2d 761, 762 (B. Bur. 1982).

7. Ultimately, the Commission ended its policy disfavoring intermixture, and in Belleville, Kansas, et al., 52 RR 2d 487, 488-489 (B. Bur. 1982), stated that it would no longer require limited reimbursement of the Class A licensee who chose to change channels so as to upgrade for competitive purposes. However, Belleville did not modify the Commission's policy of requiring at least limited reimbursement of any licensee displaced to accommodate a new or improved service -- even if the licensee could upgrade on the substitute channel.

8. Lonoke, Arkansas et al., 6 FCC Rcd 4861 (M. M. Bur. 1991) proves that the policy requiring SBS to reimburse Key Chain remains in full force and effect. Therein, a Channel 292A Lonoke station petitioned to upgrade to Channel 292C2. To accommodate the upgrade, Lonoke sought to show-cause a cochannel Clarksdale, Mississippi station to Channel 287A. Lonoke pledged to reimburse

Clarksdale for its Circleville costs. But the Clarksdale licensee counterproposed the upgrade of both stations: Channel 292C2 in place of Channel 292A at Lonoke, and Channel 293C2 instead of Channel 292A (or 287A) at Clarksdale. The Commission ruled as follows:

[T]o upgrade the Lonoke station, Lonoke Broadcasting recognizes that the Clarksdale station must change frequencies. The [NPRM]... proposed to change the Clarksdale station to Channel 287A. The Clarksdale proponent has requested that it change its frequency to Channel 293C2 and obtain an upgrade, which we are granting, in lieu of going to Channel 287A which does not permit an adjacent channel upgrade. Since Lonoke Broadcasting admittedly benefits from the change in frequency for the Clarksdale station and has stated its willingness to reimburse the Clarksdale station, we shall order reimbursement to the Clarksdale licensee for the reasonable costs in changing its frequency equivalent to the costs of changing to a Class A channel. See Mitchell, South Dakota, 30 R. R. [sic] 2d 1688 (1976).

9. On the issue of reimbursement due to Key Chain, this proceeding is indistinguishable from Lonoke. Lonoke had to reimburse Clarksdale even though Clarksdale counterproposed its own upgrade in place of a simple substitution of Class A channels -- just as Key Chain has done here. So SBS has to reimburse Key Chain for "the reasonable costs in changing its frequency equivalent to the costs of changing to a Class A channel."

10. That SBS has not proposed an upgrade of its own station -- at least not yet -- is immaterial. Although SBS has pointedly stated that **no** upgrade of WZMQ is proposed, in fact WAVK's channel has significant upgrade potential. Exhibit A hereto, the Technical Statement of Mr. Neil Smith, Key Chain's technical consultant, shows that in its construction-permit application to

implement the outcome of this rule making (assuming arguendo such outcome remains favorable to SBS), SBS can invoke the relatively new "one-step upgrade procedure" (and the contour-protection provisions of Section 73.215 of the Rules) to propose Class C1 operations at 100 kW ERP only one km from WZMQ's licensed site. The upgrade potential of Channel 292, WAVK's licensed frequency, is obviously a great benefit to SBS.

11. Also, SBS is the "last man on" at its licensed site. SBS thus bears responsibility for alleviating certain cases of receiver intermod attributable to its collocation with the Channel 271C2 Rock Harbor station WKLG. WKLG, Inc., 6 FCC Rcd 225 (1991). Alleviation of any such receiver-intermod problem will absolve SBS of the obligation, financial and otherwise, to remedy those certain cases of receiver intermod for which SBS might be responsible. Alleviation will also reduce or eliminate any potential civil liability to WCTH, the "victim" station on whose operating frequency the intermod product arises. In this way also, SBS benefits from obtaining WAVK's operating frequency for WZMQ. And in return for all these benefits, the least SBS can do is to reimburse Key Chain for the equivalent costs of shifting WAVK to another Class A channel. Lonohe, supra.

12. Finally, we have shown that Key Chain's upgrade of station WAVK:

(a) is merely incidental to a channel change whose sole purpose is to accommodate SBS; and

(b) has no bearing on SBS's duty to reimburse Key Chain for the equivalent costs of shifting WAVK to another Class A channel.



The staff must reconsider the Report and Order at least to that extent. However, if the staff persists in its original position, Key Chain will seek Commission review, and that Application for Review will withdraw Key Chain's Counterproposal nunc pro tunc. In that event, to accommodate SBS, the Commission will have to order WAVK to Channel 288A, Key Chain will obtain no upgrade, and will be clearly entitled to full, classic Circleville reimbursement from SBS. In light of that perfectly proper approach which may become available to and necessary to Key Chain to safeguard its right to reimbursement, there is no rational reason not to reconsider the reimbursement holding on reconsideration.

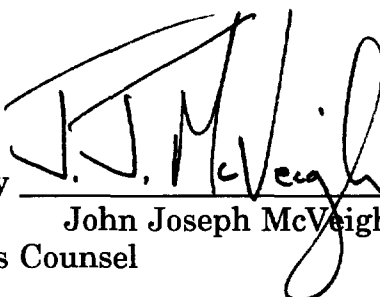
### **III. CONCLUSION**

For the reasons stated above, the FCC staff must reconsider the Report and Order on the issue of Key Chain's entitlement to reimbursement from SBS. The

staff must explicitly recognize SBS's obligation to cover the equivalent costs that Key Chain would incur shifting WAVK from Channel 292A to Channel 288A.

Respectfully submitted,

**KEY CHAIN, INC.**

By   
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Date: September 14, 1994

**EXHIBIT A**

EXHIBIT A

ENGINEERING STATEMENT

The engineering data contained herein has been prepared on behalf of KEY CHAIN, INC., licensee of WAVK(FM), Channel 292A, Marathon, Florida, in support of its Petition for Reconsideration in MM Docket No. 93-136.

In this proceeding Spanish Broadcasting System of Florida, Inc. ("SBS"), licensee of WZMQ, Channel 280C2, Key Largo, has proposed a change to Channel 292C2. In order to accomplish this change, WAVK must be removed from Channel 292A, and SBS has proposed Channel 288A as a replacement. In its Comments WAVK alternately proposed that its allotment be Channel 288C2, and the Commission accepted this counterproposal in its *Report and Order*. However, the Commission's decision also relieved WZMQ of the responsibility for the cost of the WAVK channel change, and this is the subject of the instant petition.

SBS has characterized its proposal as a simple channel change, with WZMQ remaining a Class C2 station, simply to alleviate an interference problem. However, WZMQ could become a Class C1 station on Channel 292 and could do so through the recently adopted "one-step upgrade" process. Attached is a tabulation showing that the Class C1 spacings would be met from a reference site on Upper Matecumbe Key. This site would also permit the required 70 db $\mu$  service to Key Largo by a Class C1 station.

Further, through the use of §73.215, a Channel 292C1 facility could be located in Key Largo within a kilometer of the existing WZMQ site.

EXHIBIT A

Such a facility could be proposed by SBS when it applies to implement the changes authorized in the subject *Report and Order*.

I declare under penalty of perjury that the foregoing statements and the attached tabulation are true and correct to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to be 'h' followed by a long horizontal stroke.

NEIL M. SMITH

September 14, 1994

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NEIL M. SMITH

September 14, 1994



**CERTIFICATE OF SERVICE**

I, Kelley Curtis, a secretary to the law firm of Multinational Legal Services, P.C., hereby certify that I have this Fourteenth day of September, 1994, sent copies of the foregoing "**PETITION FOR RECONSIDERATION**" by first-class United States mail, postage prepaid, to:

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